FILED
JAN 21 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 667

ANNISTON MANUFACTURING COMPANY,
A CORPORATION,
Petitioner,

vs.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

W. A. SUTHERLAND,
JOSEPH B. BRENNAN,
Counsel for Petitioner.

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SUTHERLAND, TUTTLE & BRENNAN.

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vs.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petition.

Anniston Manufacturing Company, a corporation, by its counsel, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above case on January 8, 1937 (R. 79), affirming the judgment of the United States District Court for the Northern District of Alabama (R. 54).

Questions Presented.

(1) Whether the provisions of Title VII of the Revenue Act of 1936 are constitutional and operative in so far as

they attempt to restrict or defeat Petitioner's vested right of action against a collector of internal revenue for the recovery of amounts exacted from the petitioner by the collector as taxes under the unconstitutional Agricultural Adjustment Act.

(2) Whether Sections 906 and 910 of the Revenue Act of 1936 are void under the due process clause of the Fifth Amendment as attempting to destroy petitioner's vested right of action against the collector of internal revenue personally for the recovery back of amounts wrongfully exacted under the Agricultural Adjustment Act.

(3) Whether petitioner can maintain this action without alleging compliance with the conditions imposed by Section 902 of the Revenue Act of 1936.

(4) Whether Section 902 of the Revenue Act of 1936 is void under the due process clause of the Fifth Amendment:

(a) In that it attempts to impair Petitioner's vested right to recover amounts exacted from it under the Agricultural Adjustment Act by attaching to such right conditions that have no legal, equitable or moral basis, even assuming that they involve no impossibility of proof.

(b) In that it attempts to impair and destroy Petitioner's vested right to recover amounts exacted under an unconstitutional statute by retroactively imposing conditions involving an inherent impossibility of proof.

(c) In that it arbitrarily and unreasonably shifts to Petitioner the burden of proof with respect to the matters there described.

(d) In that it is so vague, uncertain and indefinite that claimants cannot know what proof it requires.

(5) Whether Section 902 of the Revenue Act of 1936 is void under the doctrine of the separation of powers as being so vague and uncertain that the courts cannot give it any definite construction without legislating.

(6) Whether Section 906 is void under the due process clause of the Fifth Amendment:

(a) In that it fails to provide even a fair administrative remedy for the wrongful collection of amounts as taxes under the Agricultural Adjustment Act.

(b) In that it denies all effective judicial remedy for the wrongful collection of amounts as taxes under an unconstitutional statute.

(7) Whether Section 907 of the Revenue Act of 1936 is void under the due process clause of the Fifth Amendment as creating a presumption which is arbitrary and unreasonable.

(8) Whether Sections 903, 904 and 906 of the Revenue Act of 1936 fall as being simply adjuncts to, and inseparably connected with, the essential and unconstitutional provisions of Section 902 and other parts of Title VII.

Statutes Involved.

The pertinent provisions of Title VII of the Revenue Act of 1936 (Act of June 22, 1936, c. 690, Secs. 901 et seq.), entitled "Refunds of Amounts Collected under the Agricultural Adjustment Act" (7 U. S. C. A., Secs. 644-659) are set forth in the Appendix, *infra*. There are also set forth in the Appendix the provisions of Sections 3220 and 3226 of the Revised Statutes as amended.

Statement.

This action was brought by petitioner for the recovery of approximately $270,000.00 which Respondent, a collector of internal revenue, had collected from petitioner as floor stock and processing taxes under the purported authority of the Agricultural Adjustment Act,[1] which was held unconstitutional in *United States* v. *Butler*, 297 U. S. 1. The District Court sustained respondent's general demurrer and dismissed the amended complaint (R. 54), and this judgment was affirmed by the Circuit Court of Appeals (R. 79).

It is alleged in the amended complaint that all of the amounts in controversy were paid by petitioner to respondent under duress and that at the time of making all of said payments (except the first three, involving less than $8,000.00), petitioner protested to Respondent that said taxes were illegal and unconstitutional (R. 25). The complaint also alleges that claims for refund had been filed with respondent on the ground that the Agricultural Adjustment Act was unconstitutional and said taxes were illegal by reason of several provisions of the Constitution, including the Tenth Amendment (R. 5, 7, 14, 16). It is alleged further that the claims were rejected by the Commissioner prior to suit (R. 5, 14).

It is undisputed that as the law stood at the time petitioner's claims were rejected, petitioner was entitled to recover upon the basis of the allegations in the complaint. However, in his amended demurrer, respondent relied for a defense upon the provisions of Title VII of the Revenue Act of 1936, which was passed after the cause of action arose and after the suit was commenced.

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[1] Act of May 12, 1933, c. 25, Title I, 48 Stat. 31, 7 U. S. C. A. Secs. 601 *et seq.*

Section 902 of that Act provides in general that no refund shall be allowed of any amount collected as tax under the Agricultural Adjustment Act unless the claimant establishes that he bore the burden of such amount and has not shifted such burden, directly or indirectly, through inclusion in the price of articles claimant sells, through reduction of the price paid for the unprocessed commodity, "or in any manner whatsoever."

Section 903 requires the filing of new claims for refund, after the passage of the 1936 Act. Section 904 provides that no suit shall be brought to recover amounts collected as floor stock or compensating taxes under the Agricultural Adjustment Act, before the expiration of 18 months after a claim is filed under Title VII. Section 906 prohibits the maintenance of suits or proceedings to recover amounts collected as processing taxes, except as provided in Section 906. That section goes on to create a Board of Review in the Treasury Department, before which claims for refund of processing taxes may be prosecuted. Provision is made for review of the Board's decisions in the Circuit Court of Appeals and for review by this Court of the judgments of such courts on writ of certiorari. Section 907 establishes a statutory presumption for determining the extent of "shifting," based solely upon a comparison of manufacturing margins during the tax period and during a specified comparative period.

Section 910 provides that no collector of internal revenue shall be in any way liable for any act done by him under the Agricultural Adjustment Act in the performance of his official duties under the provisions of such Act.

In sustaining Respondent's general demurrer the District Court upheld the validity of Title VII upon the authority of *United States* v. *Jefferson Electric Company*, 291 U. S. 386. The Circuit Court of Appeals affirmed the

judgment of the District Court on other grounds, and expressly stated that under its view it was unnecessary to consider the effect of the decision of this Court in the *Jefferson Electric Company* case. The Circuit Court of Appeals held that this action is a suit against the United States originally "consented to by it through the fiction of a suit against the Collector" (R. 73). It held further that Congress, in the exercise of sovereign immunity to suit, had withdrawn consent to suits of this kind, and that this withdrawal was effective to cut down vested rights of action based upon the collector's exaction of money under an unconstitutional statute, *even if no substituted remedy was provided* (R. 78, 73-75). The learned Circuit Judge further held that, except by provision of statute, no right of action could have arisen against the collector for the wrongful exaction from petitioner of money under the unconstitutional Agricultural Adjustment Act for the reason that the unconstitutionality of the Act was "far from plain" and had not been searched out and declared at the time of the collections here in question (R. 75-78).

Reasons for Granting the Writ.

1. The Circuit Court of Appeals has held that the sovereign immunity of the United States can be extended so as to protect an officer from personal liability with respect to damage done by said officer while purporting to act under an unconstitutional statute. In so holding, the Circuit Court of Appeals has decided a most important constitutional question in a way clearly in conflict with the decisions of this Court in *Poindexter* v. *Greenhow*, 114 U. S. 270; *Atchison T. & S. F. R. Co.* v. *O'Connor*, 223 U. S. 280; *Hopkins* v. *Clemson College*, 221 U. S. 636, 642; *Scott* v. *Donald*, 165 U. S. 58; *Cruickshank* v. *Bidwell*, 176 U. S. 73, 81. This Court has always considered that the principle

relied upon by the court below is repugnant to the fundamental principles of our constitutional system.

2. The Circuit Court of Appeals has held that all effective remedy both against the United States and the Collector for the wrongful exaction of money under purported authority of an unconstitutional statute may be destroyed by Congress consistently with due process of law. In so holding, the Circuit Court of Appeals decided an important constitutional question in a way in conflict with the decisions of this Court in *Brinkerhoff-Faris T. & S. Co.* v. *Hill*, 281 U. S. 673; *Graham* v. *Goodcell*, 282 U. S. 409; *Carpenter* v. *Shaw*, 280 U. S. 363; *Ward* v. *Love County*, 253 U. S. 17, which held that some effective remedy must be afforded with reference to the illegal exaction of taxes.

3. In holding that this action is against the United States and not against the collector personally, the Circuit Court of Appeals has decided an important Federal question in a way clearly in conflict with the decisions of this Court in *Sage* v. *United States*, 250 U. S. 33; *Graham* v. *Goodcell*, 282 U. S. 409; *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, 5; *Patton* v. *Brady*, 184 U. S. 608.

4. The Circuit Court of Appeals has misconstrued and misapplied the decisions of this Court in *Cary* v. *Curtis*, 3 How. 236; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373; *Arnson* v. *Murphy*, 109 U. S. 238, 115 U. S. 579; *Cheatham* v. *United States*, 92 U. S. 85; *Schoenfeld* v. *Hendricks*, 152 U. S. 691.[2]

5. The decision of the court below is not in harmony with the decisions of this Court in *Ettor* v. *Tacoma*, 228 U. S. 148, 156, and *Pacific Mail Steamship Co.* v. *Joliffe*, 2 Wall.

[2] These cases are discussed under point 3 of the brief, *infra*.

450, 457, 458. In addition to relying upon the doctrine of sovereign immunity, the court below impliedly assumed that the petitioner's right of action was a statutory and not a common law right, and that for this reason also it could be divested.[3] This Court held in the cases cited that vested rights of action, although based upon statutes, cannot be divested consistently with due process of law.

6. The questions presented in this case are questions of constitutional law and of the utmost public importance. The urgent necessity and public importance of an early decision of these questions are discussed fully in the Supporting Brief.

7. The decision of the Circuit Court of Appeals is in conflict with the decisions of District Courts in two other circuits. *Charles W. Priddy & Co.* v. *Early* (E. D. Va.), unofficially reported in 1936 C. C. H. Par. 9495; *Cudahy Bros. Co.* v. *Budde* (W. D. Wis.), decided December 7, 1936, not yet reported. In the first of the cited cases; the collector's appeal is pending in the Circuit Court of Appeals for the Fourth Circuit. Three other similar cases have been decided against the taxpayers. *Butler* v. *Carney* (D. Mass.), unofficially reported in 1936 C. C. H., Par. 9526; *Edwin Cigar Co.* v. *Higgins* (S. D. N. Y.), unofficially reported in 1937 C. C. H., Par. 9013; *Sheridan Flouring Mills* v. *Cassidy* (D. Wyo.), decided January 11, 1937, not yet reported. The case of *Butler* v. *Carney, supra,* is pending on appeal in the Circuit Court of Appeals for the First Circuit, and the case of *Edwin Cigar Co.* v. *Higgins, supra,* is pending

[3] Petitioner contends that the action is a common law action modified by statute (see *Sage* v. *United States*, 250 U. S. 33), but the result would be the same under this Court's decisions even though the right were purely statutory. The right of action having once arisen, the fact that it had its origin in a statute does not deprive it of constitutional protection.

on appeal in the Circuit Court of Appeals for the Second Circuit.[4]

WHEREFORE it is respectfully prayed that the petition be granted.

W. A. SUTHERLAND,
JOSEPH B. BRENNAN,
Counsel for Petitioner.

January, 1937.

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[4] Assuming that Title VII is properly to be construed as an assertion of sovereign immunity to suit, processing tax suits against the United States involve fundamentally different questions from those involved in suits against collectors. Two processing tax suits against the United States have been decided by courts of first instance in favor of the Government. *Continental Mills* v. *United States* (Ct. Cls.), decided December 7, 1936, certiorari denied by this Court, January 4, 1937; *Barlow-Moore Tobacco Co.* v. *United States* (W. D. Ky.), decided December 12, 1936, pending here as No. 576, on petition for certiorari. The record in the first of the cited cases indicates that it was argued and submitted to the Court of Claims before the 1936 Act was passed. In the second case the petition was filed before hearing in the Circuit Court of Appeals. *Cf. Marshall Field & Co., Inc.*, v. *United States* (Customs Court), unofficially reported in 1937 C. C. H., Par. 9019, decided in favor of the taxpayer.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the District Court for the Northern District of Alabama in the present and similar cases is reported in 15 F. Supp. 257, under the name of *Lincoln Mills of Alabama* v. *Davis* (R. 51-53). The opinion of the Circuit Court of Appeals has not yet been reported, but will be found at page 66 of the record.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on January 8, 1937 (R. 79). Jurisdiction to issue the writ requested is found in the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented, Statutes Involved, etc.

A statement of the questions presented and a statement of the case will be found in the petition. The statutes involved appear in the Appendix.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that Congress can, consistently with the due process clause of the Fifth Amendment, destroy a taxpayer's vested right of action to recover from a collector amounts collected as taxes under an unconstitutional statute without affording any other remedy.

2. In holding that this action was not against the collector, personally, but was in reality an action against the United States.

3. In holding that the District Court was without jurisdiction to entertain this action.

4. In failing to hold that the provisions of Title VII violate the due process clause of the Fifth Amendment in attempting to restrict and defeat petitioner's action against a collector for the recovery of amounts exacted as taxes under the unconstitutional Agricultural Adjustment Act.

5. In failing to hold that Section 902 of the Revenue Act of 1936 is void under the due process clause of the Fifth Amendment as impairing petitioner's right to a refund.

6. In failing to hold that Section 902 is void under the constitutional doctrine of the separation of powers in that it is so vague, uncertain and ambiguous that an attempt by the courts to give it a definite construction would require the courts to legislate.

7. In failing to hold that the procedural provisions (Sections 903, 904 and 906) of Title VII are inseparably connected with Section 902 and therefore fall with that section.

8. In failing to hold that Section 906 is void under the due process clause of the Fifth Amendment as denying any effective judicial remedy for the collection of an unconstitutional tax.

9. In failing to hold that Section 906 is void under the due process clause of the Fifth Amendment as denying a fair and effective administrative remedy for the collection of an unconstitutional tax.

10. In affirming the judgment of the District Court.

ARGUMENT.

1. The Scope of the Lower Court's Application of the Doctrine of Sovereign Immunity.

Relying on the doctrine of sovereign immunity and holding that such immunity to suit may be extended to an officer acting under an unconstitutional statute, the court below held that Title VII of the Revenue Act of 1936 is valid, even if the effect of Title VII is to leave those who paid processing taxes *without any remedy whatsoever* for the recovery of the unconstitutional taxes. That such is the plain import of the Court's decision cannot be doubted, for the Court clearly held that the pre-existing remedies were lawfully destroyed by Title VII, and at the same time expressly stated that it found it unnecessary to consider whether any genuine substitute remedy was provided or whether Title VII is justified under the rule laid down in *United States* v. *Jefferson Electric Company*, 291 U. S. 386.

The court below has thus held that taxpayers from whom unconstitutional taxes have been collected are entitled only to such remedy as Congress may voluntarily elect to give them, even as against the officer committing the wrong, and that Congress may lawfully and without any justification fail to provide them with any remedy whatsoever. This holding of the court below propounds a new and unprecedented rule of law which far transcends in significance and importance the matter immediately in hand. If the decision of the court below is correct and if the principles therein decided are established as the law of the United States, their operation and effect will be a matter of the gravest importance long after processing taxes and Title VII have become history.

On no theory is it possible to justify the taking away of all remedy from a citizen whose rights have been injured by

an officer of the United States acting under an unconstitutional statute. Such withdrawal of all remedy cannot be justified under the doctrine of sovereign immunity. Granting that sovereign immunity may be claimed by the United States in its own behalf at will and without restriction, it is entirely clear that sovereign immunity may not be extended to protect also the officer who committed the wrong, since if this were done the citizen whose constitutional rights were invaded would be left without any remedy. The importance of the distinction was recognized by this Court in *Poindexter* v. *Greenhow*, 114 U. S. 270, where the Court said (p. 291):

> "This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people, from that despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State—to say 'L'Etat, c'est moi'. Of what avail are written constitutions, whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. • • •"

In *Brinkerhoff-Faris T. & S. Co.* v. *Hill*, 281 U. S. 673, this Court recognized the importance of the rule that a taxpayer whose constitutional rights have been invaded cannot lawfully be deprived of all remedy, this Court saying (p. 682):

> "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

In *Graham* v. *Goodcell*, 282 U. S. 409, this Court approved the principle of the *Brinkerhoff-Faris T. & S. Co.* case, *supra*, as applied to the Federal Government and its officers, saying (p. 430):

> "If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong. See Brinkerhoff-Faris Trust & Sav. Co. *v.* Hill, 281 U. S. 673, 679, 680."

The decision of the court below is in direct conflict with the decisions of this Court which have just been cited and with the other decisions of this Court which are cited under the first and second reasons for granting the writ, as set forth in the petition for certiorari. The decision of the court below is not only in conflict with the decisions of this Court, but it also involves questions of Federal law and of constitutional law of the gravest and most far-reaching public importance.

2. Personal Nature of Actions Against Collectors of Internal Revenue.

The court below held that this is not an action against the Collector of Internal Revenue personally, that the Collector is "not a real, but only a nominal or fictional Defendant", and that the United States is the real Defendant in the action (R. 76, 77). This holding is in clear conflict with numerous decisions of this Court.

In *Sage* v. *United States*, 250 U. S. 33, this Court held that a judgment against a collector of internal revenue for a partial refund is not a bar to a subsequent suit against the United States in the Court of Claims for the residue of such tax, since the United States was not a party to the first suit. In reaching this result Mr. Justice Holmes considered all the suggestions which may be urged as to the non-personal character of the action against a collector for a refund of taxes. In writing the opinion of the court he says (pp. 36-37):

> "It is true that the statutes modify the common-law liability for money wrongfully collected by duress so far as to require a preliminary appeal to the Commissioner of Internal Revenue before bringing a suit (Rev. Stat. Sec. 3226) * * *. The suit is personal, and its incidents, such as the nature of the defenses open and the allowance of interest, are different. It does not concern property in which the United States asserts an interest on its own behalf or as trustee, as in Minnesota *v.* Hitchcock, 185 U. S. 373, 388. At the time the judgment is entered the United States is a stranger. Subsequently the discretionary action of officials may, or it may not, give the United States a practical interest in the amount of the judgment, as determining the amount of a claim against it, but the claim would arise from the subsequent official act, not from the judgment itself."

The principle of the *Sage* case has been recently applied by this Court in *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308.

In *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, it was held that an action could not be maintained against the successor in office of a collector of internal revenue who had collected excessive and illegal taxes. In that case Mr. Justice Holmes, writing the opinion of the court, again repudiated the suggestion that the statutes created a new statutory liability attached to the office of the collector, who it was urged, was simply a formal defendant. The Court there said (p. 5):

> "In Patton *v.* Brady, 184 U. S. 608, a suit against a collector, * * * it was held that it could be revived against his executrix, which shows again that the action is personal; as also does the fact that the collector may be held liable for interest. Erskine *v.* Van Arsdale, 15 Wall. 75; Redfield *v.* Bartels, 139 U. S. 694."

In *Graham* v. *Goodcell, supra,* this Court had for consideration the constitutionality of Section 611 of the Revenue Act of 1928, a curative statute whereby Congress undertook to ratify certain unauthorized and illegal collections of internal revenue taxes. The Court held that the particular statute involved in *Graham* v. *Goodcell* was valid as a curative statute.[5] However, the Government had made the argument that Section 611 could be upheld as a withdrawal by Congress of the consent of the United States to be sued.

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[5] The particular statute involved in *Graham* v. *Goodcell* was held valid as a curative statute upon principles of legislative ratification. Section 21(b) of the Agricultural Adjustment Act which was added by the amendatory act of August 24, 1935, undertook to legalize or ratify collection of the processing taxes upon principles similar to those applied in *Graham* v. *Goodcell*. This Court held that the attempt to legalize processing taxes could have no effect in view of the lack of congressional power to impose the taxes in the first instance. *United States* v. *Butler et al.*, 297 U. S. 1, 78; *Rickert Rice Mills, Inc.*, v. *Fontenot*, 297 U. S. 110, 113.

This contention of the Government was repudiated by this Court in the following language (282 U. S. at p. 430):

> "The argument of the government in this respect is not adequate to dispose of the controversy. Some of the present suits were brought against the collector individually and were based upon the right to recover as against him by reason of his illegal acts. Such an action is personal, and not against the United States. • • • If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong. See Brinkerhoff-Faris Trust & Sav. Co. *v.* Hill, 281 U. S. 673, 679, 680."

3. Decisions of This Court Erroneously Relied Upon by the Circuit Court of Appeals to Sustain Its Decision.

In support of its holding that an action against a collector of internal revenue to recover amounts illegally collected as taxes is a purely statutory action which cannot be maintained without statutory consent, and that Congress may at any time withdraw that consent so as to defeat such causes of action, even after they have arisen, the Circuit Court of Appeals cites the following decisions of this Court: *Cary* v. *Curtis*, 3 How. 236; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373; *Arnson* v. *Murphy*, 109 U. S. 238; *Cheatham* v. *United States*, 92 U. S. 85; *Schoenfeld* v. *Hendricks*, 152 U. S. 691. It is submitted that none of these cases is authority for the lower court's holding, and that the court below has misconstrued and misapplied them.

The case of *Cary* v. *Curtis*, *supra*, is clearly distinguishable from the present case. The court in that case pointed out that the effect of the statute there involved was simply to make the particular form of action (for money had and

received) inapplicable, and that other judicial remedies (replevin, detinue and trover) were left open to the persons affected by the statute (3 How. at p. 250). Thus this Court did not hold in *Cary* v. *Curtis*, as the court below has held in the present case, that the taxpayers may be left without any remedy. Also, the statute involved in *Cary* v. *Curtis*, unlike Title VII, was not applied retroactively so as to affect any previously vested right of action against a collector, and the court relied upon the fact that the statute was prospective in operation, and served as "notice to everyone" (3 How. at p. 241).

In the case of *Moore Ice Cream Co.* v. *Rose*, *supra*, on which the Circuit Court of Appeals relied, this Court held that Congress could *enlarge the collector's liability* for illegal collections by giving taxpayers a right of action, even where payments were not made under protest. Under the circumstances of that case it was apparent from the record that the collector would be indemnified by the Government, and could therefore suffer no loss. Consequently, he was not entitled to raise any question of the taking of property from him without due process. Neither the decision nor the reasoning of this Court supports the conclusion of the Circuit Court of Appeals here, or even suggests that a right of action against a collector for a wrongful collection could be taken away and no adequate remedy substituted.

In *Cheatham* v. *United States*, *supra*, also relied upon in the court below, it was asserted that Congress could require previous appeal to the Commissioner of Internal Revenue as a condition precedent to a suit against a collector for an erroneous collection. Such procedural regulations are of course reasonable, and, unlike Title VII, do not in any way impair or destroy the taxpayer's right of action. Cf. *Jones* v. *Union Guano Co.*, 264 U. S. 171.

In none of the other cases relied upon by the court below was the taxpayer deprived of all effective remedy.

4. The Public Importance and Need for an Early Decision.

The great public importance of the questions involved here is indicated from the fact that processing taxes were illegally collected from 73,000 taxpayers, and floor stock taxes from many more.[6] Any claims for refund to be filed by these taxpayers under Title VII must be filed prior to July 1, 1937, and it is provided in Section 903 that all evidence relied upon in support of such claims shall be clearly set forth. An attempt, however futile, to supply this evidence will immediately involve large expense. Administrative machinery will be necessary, under the requirements of the Act, to pass upon the issue of "shifting" in these cases. The Processing Tax Board of Review has been set up in the Treasury as provided in Section 906 and rules have been promulgated by the Board.[7] The tremendous expense of proceeding with these steps will be altogether unnecessary if, as we contend, Title VII as a whole is unconstitutional.

An early decision of the questions here involved is most important to the large group of processing taxpayers for other reasons. As stated above, refund claims under Title VII must be filed prior to July 1, 1937. If taxpayers file claims and institute proceedings under these provisions, they may be estopped to attack the constitutionality of such provisions. Cf. *Buck* v. *Kuykendall*, 267 U. S. 307, 316; *Hirsh* v. *Block*, 267 Fed. 614 (D. C. App.), reversed on other grounds, 256 U. S. 135.

Apart from estoppel, processing taxpayers who file petitions with the Board of Review under Title VII may find that the Board is unable to grant any relief if they suceed in establishing the unconstitutionality of Title VII. If the

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[6] Senate Rep. No. 2156, 74th Cong., 2nd Sess., p. 32; House Rep. No. 2818, 74th Cong., 2nd Sess., p. 2.

[7] 1 Federal Register 1934.

provisions of Section 906 creating a Board of Review and defining its jurisdiction and powers should be held to be inseparably connected with Section 902, as we think they are, and if the provisions of Section 902 are held unconstitutional as impairing vested rights, Section 906 would fall along with Section 902 and there would therefore be no statutory authority for the Board to enforce the constitutional rights of taxpayers in the Board proceedings.

A mere reading of the provisions of Title VII should make it clear that the procedural provisions of Sections 903, 904 and 906 were adopted solely upon the assumption that the substantive provisions of Section 902 were valid. The legislative history makes it absolutely clear that the Board of Review was created for the sole purpose of passing upon the "extremely complicated economic and accounting considerations" involved in the determination as to whether the processing tax burden had been shifted.[8] If Section 902 is unconstitutional, and if it is therefore unimportant whether the tax burden has been shifted in individual cases, then it is inconceivable that Congress would have intended that the novel procedural provisions of Title VII should remain operative.[9] The procedural provisions of Title VII are inseparably connected with the substantive provisions; and taxpayers who elect to invoke the procedure provided in Title VII are likely to gain a futile victory if they succeed in establishing the unconstitutionality of Section 902, only to find that the Board of Review itself has no legal existence and is therefore without power to grant them relief.

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[8] See Senate Rep. No. 2156, 74th Cong., 2nd Sess., p. 33; House Rep. No. 2818, 74th Cong., 2nd Sess., p. 2.

[9] See *Lynch* v. *United States*, 292 U. S. 571, 586; *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 241, 242; *Poindexter* v. *Greenhow*, 114 U. S. 270, 304, 305; *Dorchy* v. *Kansas*, 264 U. S. 286, 289, 290; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 361, 362; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312, 313.

Moreover, if this Court delays the decision of these constitutional questions, and Title VII is eventually held constitutional, the dockets of the Federal Courts will have been unnecessarily congested with thousands of cases of this type. Such actions must be brought within two years from notice of rejection of the refund claims.[10] The claims in thousands of such cases were rejected as far back as August 1935 (R. 5, 14). According to the Department of Justice, 250 cases like the present are already pending in the lower Federal courts. With the end of the limitation period approaching, thousands of new suits will probably be filed.

There is, therefore, an urgent need for an early decision of the questions here presented because of the public and private expense involved and because of the confusion and uncertainty that exist as to the constitutional rights of thousands of taxpayers.

Conclusion.

In view of the fact that the court below has decided vitally important and far reaching questions of constitutional law in a way clearly in conflict with decisions of this Court and contrary to the fundamental principles of our constitutional system, and in view of the great public importance of an early reversal of these holdings and an early settlement of the issues involved in these processing tax refund suits, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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[10] Rev. Stat. Sec. 3226, as amended by Sec. 1103 of the Revenue Act of 1932, c. 209, 47 Stat. 169.